

**JUDICIAL COUNCIL OF CALIFORNIA  
ADMINISTRATIVE OFFICE OF THE COURTS**

455 Golden Gate Avenue  
San Francisco, California 94102-3688

**Report**

TO: Members of the Judicial Council

FROM: Civil and Small Claims Advisory Committee  
Hon. Douglas P. Miller, Chair  
Discovery and Rules Reform Subcommittee  
Hon. Elihu M. Berle, Chair  
Patrick O'Donnell, Committee Counsel, 415-865-7665,  
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DATE: October 16, 2002

SUBJECT: Conducting Depositions by Telephone, Videoconference, or Other  
Remote Electronic Means (adopt Cal. Rules of Court, rule 333)  
(Action Required)

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Issue Statement

Last year, the Judicial Council sponsored legislation on electronic discovery. This legislation was enacted as part of Assembly Bill 223 (Frommer) and became effective January 1, 2002. AB 223 amended section 2025 of the Code of Civil Procedure to include the following provision:

A person may take, and any person other than the deponent may attend, a deposition by telephone or other remote electronic means. The court may expressly provide that a nonparty deponent may appear at his or her deposition by telephone if it finds there is good cause and no prejudice to any party. A party deponent must appear at his or her deposition in person and be in the presence of the deposition officer. *The procedures to implement this section shall be established by court order in the specific action proceeding or by the California Rules of Court.*

(Code Civ. Proc., § 2025(h)(3) (italics added).)

The purpose of this statutory amendment was to authorize the taking of oral depositions by telephone, videoconference, and other remote electronic means.

The statute should make it easier for litigants to take depositions and reduce their costs.

### Recommendation

The Civil and Small Claims Advisory Committee recommends that the Judicial Council, effective January 1, 2003, adopt rule 333, to implement Code of Civil Procedure section 2025(h)(3) by prescribing specific procedures for conducting oral depositions by telephone, videoconference, and other remote electronic means.

The text of rule 333 is attached at page 7.

### Rationale for Recommendation

Proposed new rule 333 has several provisions. Subdivision (a) prescribes the notice that a party must give that a deposition will be taken by telephone, videoconference, or other electronic means. A party taking a deposition electronically must give notice of this intention with the notice of deposition or the subpoena. The subdivision also provides that the party noticing the deposition must make the arrangements for any other party to participate in the deposition in an equivalent manner. It requires each party to pay the expenses incurred by it or allocated to it. And it provides that any party may be personally present at the deposition without giving prior notice.

Subdivision (b) provides that any party may appear and participate in a deposition by telephone, videoconference, or other electronic means provided the party gives written notice of such appearance at least three days before the deposition, makes all arrangements, and pays all expenses incurred for the appearance.

Subdivision (c) requires a party deponent to appear at his or her deposition in person and to be in the presence of the deposition officer.

Subdivision (d) provides that a non-party deponent may appear at his or her deposition by telephone, videoconference, or other remote electronic means with court approval upon a finding of good cause and no prejudice to any party. This subdivision further provides that the deponent must be sworn in the presence of the deposition officer or by any other method stipulated to by the parties or ordered by the court. Any party may be personally present at the deposition.

Subdivision (e) provides that, upon motion by any person, the court in a specific action may make such other orders as deemed appropriate. This provision recognizes that there are aspects of conducting depositions by electronic means (such as the production and use of documents at depositions) that are not covered

by the rule. The parties are expected to reach agreement on these matters among themselves, if possible; but if they cannot, the court may enter appropriate orders.

#### Alternative Actions Considered

Absent a rule, courts could implement Code of Civil Procedure section 2025(h)(3) on a case-by-case basis. However, for the guidance of parties in litigation, the committee thought that a general rule providing procedures to implement the statute is desirable.

#### Comments From Interested Parties

A total of 13 comments were received on rule 333. The commentators included a judge, a discovery commissioner, the Court Executives Advisory Committee, a Superior Court's Rules and Forms Committee, court administrators, representatives of the State and local bar associations, a private attorney, representatives of the California and a local court reporters associations, and a law professor. Most commentators supported the rule although a number of modifications were proposed.<sup>1</sup>

The Rules and Forms Committee of the Superior Court of Orange County submitted a proposal by Judge Kim Dunning to revise rule 333. The advisory committee agreed that Judge Dunning's version was clearer and better organized than the version circulated for comment. The committee also agreed that additional provisions should be added to the rule based on the comments. The revised version of the rule contains more clearly delineated subdivisions. It also contains a provision relating to the appearance of non-parties. And it contains a provision that, upon motion by any person, "the court in a specific action may make such other orders as it deems appropriate."

The State Bar's Committee on the Administration of Justice (CAJ) provided comments and made suggestions. First, like the Superior Court of Orange County, CAJ proposed that the rule be modified to clarify that non-party deponents may appear at their deposition by telephone if the court finds good cause and no prejudice to any party. The committee agreed and added a new subdivision reflecting the statutory provision. (See rule 333(d).) Second, the CAJ suggested that rule 333 should be modified to clarify that a non-noticing party may attend a deposition by telephone or other remote electronic means, even when the deposition is taken in person. The committee agreed and added a separate provision on this matter, specifying the requirements under which a non-noticing party may do so. (See rule 333(b).)

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<sup>1</sup> A chart summarizing the comments and the committee's responses is attached at pages 8–22.

Like the Superior Court of Orange County's Rules and Forms Committee and CAJ, other commentators proposed that rule 333 incorporate the statutory provision contained in amended Code of Civil Procedure section 2025(h)(3) that "[t]he court may expressly provide that a non-party deponent may appear at his or her deposition by telephone if it finds that there is good cause and no prejudice to any party." The committee agreed with these suggestions. (See rule 333(d).) One commentator further suggested that rule 333 should provide more guidance for implementing non-party procedures. In response, the committee added additional provisions on this subject. It also clarified that the provision allowing non-parties to appear at depositions by telephone would extend to videoconferences and other appropriate electronic means, provided the court makes the proper findings. (See *id.*)

The vice president of the California Court Reporters Association submitted a comment. He suggested that rule 333 should be modified to include "the court reporter" among those who must be personally present at the deposition of a party. The committee did not think that this addition was necessary. The commentator also proposed adding a sentence: "The court reporter need not be personally present with the deponent if the reporter is able to adequately see and hear the deponent from his or her physical location." The committee did not agree with this particular suggestion. However, in response, it modified the second sentence of (d) to state: "The deponent must be sworn in the presence of the deposition officer or by any other means stipulated to by the parties or ordered by the court."

The president of the Los Angeles County Court Reporters Association recommended that action on rule 333 be deferred and that the issues regarding reporting of depositions be referred to the Reporting of the Record Task Force. The committee believed that the technical challenges to expanding use of telephones and videoconferences to cover depositions are not of sufficient magnitude to justify postponement of the adoption of rule 333. For the convenience of litigants, it is important that rule 333 be adopted promptly.

Finally, Commissioner Richard Best of the San Francisco Superior Court provided an extensive set of comments. First, he suggested that a new section be added to rule 333 stating:

"No provision of this rule should be interpreted to infringe upon the right of a party to appear at a deposition by any remote electronic means, provided only that such party assumes initial responsibility for any expense or arrangements for such appearance."

The committee did not think that it was necessary to include such a broad policy statement and rule of interpretation in rule 333.

Second, Commissioner Best recommended that the rule include provisions that it is “subject to and modifiable by court order in a particular case.” The committee agreed. A provision based on similar language proposed by the Superior Court of Orange County has been added to the rule. (See rule 333(e).)

Third, Commissioner Best suggested that the rule should distinguish between—or separate rules should be adopted regarding—telephone depositions and other kinds of technologies such as videoconferences or Internet depositions. The committee did not think it is necessary to develop such detailed rules.

Fourth, in lieu of a rule, Commissioner Best suggested that Standards of Judicial Administration might be adopted, along with a simple enforcement provision. He suggested that the enforcement provision might state:

“If objection is promptly made, no deposition may be used or referenced in any manner if it is not taken in [full/substantial] compliance with this provision, absent the consent of all parties affected or absent a showing of good cause and [substantial] compliance or justification for noncompliance.”

The committee did not agree with this suggestion. It felt that a rule-based approach is preferable to the proposed standard combined with an enforcement provision.

Fifth, Commissioner Best observed that rule 333 does not address document production. He mentioned a number of issues that may possibly arise concerning documents as depositions. The committee concluded that the issue of how documents should be handled at depositions conducted by electronic means will be complicated, will often vary from case-to-case, and should be left to the parties to determine. The court may enter an appropriate order on the use of documents at depositions under rule 333(e), if necessary.

Sixth, Commissioner Best raised the question whether the rule should address access to depositions. He added that perhaps this issue is “better left to another rule or statute.” The committee agreed that this is not an appropriate matter to be included in rule 333.

#### Implementation Requirements and Costs

Rule 333 provides procedures for the conduct of depositions by electronic means by the parties to civil lawsuits. The rule should reduce the costs of litigation. It should not require significant implementation or impose substantial costs on the

courts, except to the extent courts are asked to resolve disputes or to enforce the provisions of the rule.

## Attachments

Rule 333 of the California Rules of Court is adopted, effective January 1, 2003, to read:

**Rule 333. Oral depositions by telephone, videoconference, or other remote electronic means**

**(a) [Taking depositions]** Any party may take an oral deposition by telephone, videoconference or other remote electronic means, provided:

(1) Notice is served with the notice of deposition or the subpoena;

(2) That party makes all arrangements for any other party to participate in the deposition in an equivalent manner. However, each party so appearing must pay all expenses incurred by it or properly allocated to it;

(3) Any party may be personally present at the deposition without giving prior notice.

**(b) [Appearing and participating in depositions]** Any party may appear and participate in an oral deposition by telephone, videoconference, or other remote electronic means, provided:

(1) Written notice of such appearance is served by personal delivery or facsimile at least three days before the deposition;

(2) The party so appearing makes all arrangements and pays all expenses incurred for the appearance.

**(c) [Party deponent's appearance]** A party deponent must appear at his or her deposition in person and be in the presence of the deposition officer.

**(d) [Non-party deponent's appearance]** A non-party deponent may appear at his or her deposition by telephone, videoconference, or other remote electronic means with court approval upon a finding of good cause and no prejudice to any party. The deponent must be sworn in the presence of the deposition officer or by any other means stipulated to by the parties or ordered by the court. Any party may be personally present at the deposition.

**(e) [Court orders]** Upon motion by any person, the court in a specific action may make such other orders as it deems appropriate.

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	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
1.	Honorable Ronald L. Bauer Superior Court of California, County of Orange	AM	Y	<p>The Rules and Forms Committee of the Orange County Superior Court reviewed the proposal and approved the following comments submitted by Judge Kim Dunning. Judge Dunning would revise the rule as follows:</p> <p>Rule 333. Oral depositions by telephone, videoconference, or other remote electronic means</p> <p>(a) Any party may take an oral deposition by telephone, videoconference, or other remote electronic means, provided:</p> <p style="padding-left: 40px;">(1) Notice is served with the notice of deposition or the subpoena;</p> <p style="padding-left: 40px;">(2) That party makes all arrangements for any other party to participate in the deposition in an equivalent manner. However, each party so appearing must pay all expenses incurred by it or properly allocated to it.</p> <p>(b) Any party may appear and participate in a oral deposition by telephone, videoconference, or other remote electronic means, provided:</p> <p style="padding-left: 40px;">(1) Written notice of such appearance is served by personal delivery or facsimile at least three days before the deposition;</p>	<p>The committee agreed that Judge Dunning's version of rule 333 was clearer and better organized than the version circulated for comment. Consequently, it was used as the basis for the final version of the rule.</p> <p>The committee agreed that this version of (a) was clearer than the version circulated for comment. The committee added a new (a)(3) based on other comments.</p>

Positions: A = Agree; AM = Agree only if modified; N = Do not agree.



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				<p>(2) The party so appearing makes all arrangements and pays all expenses incurred for the appearance.</p> <p>(c) A party deponent must appear at his or her deposition in person and be in the presence of the deposition officer.</p> <p>(d) A non-party deponent may appear at his or her deposition by telephone, with court approval upon a finding of good cause and no prejudice to any party.</p> <p>(e) Upon motion by any person, the court in a specific action may make such other orders as deemed appropriate.</p>	<p>The committee agreed that this provision based on Code of Civil Procedure section 2025(h)(3) should be included in the rule.</p> <p>The committee agreed that a provision such as (d) based on Code of Civil Procedure section 2025(h)(3) should be included in the rule. The subdivision was expanded based on other comments.</p> <p>The committee agreed that a general provision such as contained in (e) should be included in the rule.</p>
2.	Hon. Richard Best Superior Court of California, County of San Francisco	N	N	The fundamental principle established by Code of Civil Procedure section 2025(h)(3) is that a party has a right to attend a deposition by telephone or other remote electronic means such as Internet or videoconference. Currently, lawyers make informal arrangements to attend depositions by telephone and that practice should continue to be encouraged. Although court orders or rules in the California Rules of Court may be necessary in cases where lawyers cannot agree on procedures or costs or the integrity	

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				<p>of the deposition process requires some safeguards, any rule that impedes or infringes upon the right to attend by telephone would be contrary to the legislative intent.</p> <p>A provision such as the following should be added to assure the right to appear by remote electronic means is not compromised inadvertently by any provisions in the rule:</p> <p>“(d) No provision of this rule should be interpreted to infringe upon the right of a party to appear at a deposition by any remote electronic means, provided only that such party assumes initial responsibility for any expense or arrangements for such appearance.”</p> <p>To assure that parties are aware of their right to recourse to the courts to resolve issues, any rule should include an express provision that the rule is subject to and modifiable by court order in the particular case. The statute provides for implementation by court order in the case or the California Rules of Court. Often the adversary procedure in a particular case is superior to a generic rule in that it not only provides flexibility but allows for prompt correction of any defects in procedure. A phrase such as “subject to order of court in the particular action or proceeding” should be added at the beginning of any rule.</p>	<p>The committee did not think that it is necessary to include such a policy statement in the rule. The report on the rule provides background on its intent.</p> <p>The committee agreed and has added a provision for modification by court order. (See rule 333(e).)</p>

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				<p>In writing rules on this subject, the committee might want to distinguish between procedures—and even draft separate rules—to be followed for telephonic depositions and other technologies such as videoconferencing or Internet depositions, since the burden on parties and the issues differ. Most people have telephones, but may not have facilities for videoconference or Internet depositions. If a videoconference is noticed, does the noticing party have to arrange access to facilities and a convenient place for someone to attend? Should the videoconference hardware and software comply with industry standards? Must the same ease of attendance be made available to all parties or is each party on its own to make its arrangements? Detailed rules exist in the Code of Civil Procedure for video taping depositions; should similar rules be adopted for video conferencing? Should both deponent and the examiner be on screen? Should court reporters have some duties, authority, or supervision of the process?</p> <p>Rather than writing a specific rule, the committee might want to consider setting minimum standards or parameters applicable to depositions by remote electronic means. For example, see Judicial Administration Standard 21 regarding telephonic hearings. A simple enforcement provision could be added to such a standard: e.g.,</p>	<p>The committee did not think it is necessary or desirable to make such a distinction or to draft separate rules. If based on experience, additional distinctions or provisions prove to be necessary, the rule may be amended or supplemented.</p> <p>The committee disagreed with the suggestion to adopt a standard instead of rule 333. For the direction of litigants, a clear rule is generally preferable to a standard combined with an enforcement provision.</p>

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				<p>“If objection is promptly made, no deposition may be used or referenced in any manner if it is not taken in [full/substantial] compliance with this provision, absent the consent of all parties affected or absent a showing of good cause and [substantial] compliance or justification for noncompliance.”</p> <p>The proposed rule does not address document production. Should rules be adopted regarding the use of documents and access to documents by other counsel? Can documents be provided to the witness during the deposition? If so, by whom, in what manner and with what safeguards? Should they be provided in advance to all parties appearing by telephone if the noticing party is in physical attendance or to those in physical attendance and the court reporter if the lawyer taking the deposition is doing so remotely? If so, when and how? If something unexpected comes up in the deposition, can a party use a document not provided in advance? Can unanticipated documents be provided by fax or e-mail or Federal Express or must a service be used to provide documents over the Internet? Can documents be used and a witness examined over a document provided only over the Internet? Should the deposition service be required or authorized to handle or provide for such matters? When the deponent is producing large number of documents,</p>	<p>The committee deliberately decided not to include provisions concerning documents because it believed that issues about documents are best dealt with by parties on a case-by-case basis. Courts can address issues relating to documents under rule 333(e), if necessary. Also, if general provisions on this subject prove to be necessary, they can be added later.</p>

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				<p>how should they be copied and distributed? Should they be scanned and uploaded to a Web site? Should they be produced in advance of the oral deposition or the commencement of questions? If so, how many days? If the documents have previously been produced in formal discovery, can they be used without providing another copy to parties who already have them?</p> <p>Should rules be adopted restricting access to the deposition [e.g., to parties, experts, and counsel of record] or identifying those present by remote means? Identifying those speaking? Preventing or authorizing the recordation, reproduction, and use of copies? Or should a party be required to seek a court order excluding persons? Perhaps this issue is better left to another rule or statute.</p> <p>Provision (a) The first sentence imposes a notice requirement that does not exist in the statute. It may have some unintended consequences that could be avoided by adding provision (d) proposed above. It could be interpreted as an invalid prerequisite to the right to appear electronically, contrary to the statute establishing a right to take and attend a deposition by telephone etc.</p>	<p>The committee agrees that these issues are better left to another rule or statute.</p> <p>The notice provision in (a) is appropriate. The legislation authorizes the Judicial Council to establish procedures for implementing the electronic deposition statute. (See Code Civ. Proc., § 2025(h)(3).) The notice requirement is not inconsistent with the statute and is consistent with other similar statutes. It provides notice to other parties of the</p>

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				<p>The statute confirms a right to appear by telephone. However, the proposed notice requirement may, in effect, require a person noticing a deposition to attend in person unless notice of intent to appear by telephone is given in the initial notice, even if circumstances change or everyone else is attending by telephone. If some unexpected problem arises that prevents or interferes with the noticing party's attendance, it should be able to waive its right to be physically present, even at the last moment, since there is no harm to others and the alternative might be a last minute cancellation of the deposition with other parties' incurring unnecessary expenses. If every other party gave notice that it would attend telephonically, the party noticing a regular deposition should be able to appear telephonically even if such notice was not given originally. This notice requirement will encourage every prudent lawyer to include such notice in every deposition notice—just to be on the safe side.</p> <p>It is possible this notice requirement will become meaningless or misleading. Many lawyers will add this notice provision to every notice of deposition just to be on the safe side—just as they now notice a video deposition in all cases, just to be on the safe side.</p>	<p>manner in which the deposition will be concluded and an opportunity to appear in a similar manner.</p> <p>The sentence in the draft circulated for comment that would have required the party taking the deposition to be personally present with the deponent has been deleted.</p> <p>The committee was not convinced that these were real problems. Parties are not likely to notice a telephone or videoconferenced deposition and make the</p>

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				<p>There is no obligation to attend by telephone or prevent the noticing party from appearing in person and no downside to the noticing party from adding the provision to the standard notice. Should a lawyer be required to attend by telephone if the deposition is so noticed since it has announced the intent to do so and others may rely on that notice? Can others safely appear by telephone on the assumption the noticing party will appear by telephone as noticed? Does the notice become misleading if the noticing party does not attend by telephone even if they originally “intended” to do so?</p> <p>Perhaps, the noticing party should be able to have it both ways: Notice an intent to appear by telephone, but reserve the right to appear in person and/or notice a regular deposition and reserve the right to appear electronically. It would not be surprising to see this practice arise even if not expressly authorized.</p> <p>Absent some purpose, obligations, and consequences from a notice requirement, it should not be imposed as a prerequisite to attending a deposition by telephone. It is not clear what this rule is intended to accomplish and whether it will achieve the intended result without adverse unintended consequences.</p> <p>Court reporter and deponent present in person. Does this rule require a California court reporter to travel to</p>	<p>required arrangements, unless they actually intend to take or appear at the deposition in such a manner.</p> <p>There is a clear, important purpose of the notice requirement namely, to inform other parties of the manner in which the deposition will be taken and to afford them the opportunity to appear in an equivalent manner.</p>

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				<p>the deposition site? The court reporter lobby groups thought they changed the statute to allow them to be present at the deposition site by telephone while physically present at another site in California. Should a distinction be made as to court reporter attendance between non-party witnesses deposed outside California and not subject to California jurisdiction and party witnesses? Can a California court reporter swear in a non-party witness in Karachi and subject them to perjury prosecution? If not, is that witness “under oath” and would the deposition testimony be admissible? It may be better to omit this provision and let the lawyers and court reporters make the decision. Should a distinction be made as to court reporter attendance at in-state vs. out-of-state depositions?</p> <p>Provision (b) [as circulated for comment]: To avoid allowing payment issues to frustrate or delay the deposition process, something like the following provision might be added:</p> <p>“The party noticing the deposition by telephone [etc.] shall make all arrangements and payments necessary to conduct the deposition in the manner noticed and to allow other parties to attend in the manner noticed subject to any reimbursement required of other parties. Any payment or reimbursement disputes shall not delay or frustrate the taking of the deposition</p>	<p>The sentence in the version of the rule circulated for comment that required the deposition to be conducted as if all parties were present at the location of the deponent and the person administering the oath has been deleted. Thus, the revised rule is more flexible, however, the committee still thought that to ensure reliability, that rule should include a provision that the deponent must be sworn in the presence of a deposition officer.</p> <p>The committee concluded that the proposed language relating to arrangements and payment of expenses (relocated to rule 333(a)(2)) is satisfactory.</p>



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				<p>as noticed.”</p> <p>In addition, the rule might expressly provide that the party noticing a videoconference deposition be responsible for making arrangements and paying for the basic set up expenses regardless of whether they use such facilities. This would discourage parties from noticing such a deposition and then not following through.</p> <p>Provision (c) [as circulated for comment]: There are various circumstances to which this section might apply and it is not entirely clear which ones are intended to be addressed:</p> <ol style="list-style-type: none"> <li>1. A particular type of electronic deposition is noticed and the party wants to join in the same type [this looks like the scenario addressed except for the obligation to make arrangements where (b) and (c) might conflict slightly];</li> <li>2. A particular type was noticed and the party wants to participate via a different type:</li> <li>3. A regular deposition was noticed and a party wants to participate by remote electronic means;</li> <li>4. A regular deposition was noticed, party 2 wants to participate by telephone, party 3 wants to participate</li> </ol>	<p>The committee concluded that the final version of the rule is sufficiently flexible to apply to all the situations suggested by the commentator. (See rule 333(b).)</p>

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				<p>by Internet, party 4 wants to participate by videoconference, party 5 wants to join in the videoconference, and the noticing party later decides to join in the Internet deposition after all.</p> <p>The statute provides that any party has a right to appear by telephone, etc., at any deposition regardless of how the noticing party intends to appear. The proposed rule does not seem to address situations where the non-noticing parties elect to appear by remote electronic means, i.e., (3), (4), and (5) above. It may be better not to do so; but it should be clear that that scenario is not addressed. Perhaps, the above-proposed subsection (d) satisfies this concern.</p>	The rule covers non-noticing parties. (See rule 333(b).) New subdivision (d) can cover unanticipated situations, if court involvement is necessary.
3.	Lori Meseke Judicial Council Liaison Chair San Joaquin County Bar Association	AM	N	The rule should incorporate the language of the recent amendment to CCP section 2025, which provides that “The court may expressly provide that a non-party deponent may appear at his or her deposition by telephone if it finds there is good cause and no prejudice to any party.”	The committee agreed and included the language as rule 333(d).
4.	Richard W. Millar President Orange County Bar Association	N	Y	Code of Civil Procedure section 2025(h)(3) provides that the court “may expressly provide that a non-party deponent may appear at his or her deposition by telephone if it finds there is good cause and no prejudice to any party.” This proposed rule should	The rule has included some additional guidance for non-party deponents in rule 333(d).

Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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				establish some procedures for implementing the “nonparty” procedures since no guidance exists anywhere for initiating such procedures.	
5.	Andrea Nelson Superior Court of California County of Butte	A	N	Agree with proposed changes.	No response required.
6.	Lenor R. Noll Deputy Court Executive Officer Superior Court of Monterey County	A	N	Agree with proposed changes.	No response required.
7.	Cynthia Papsdorf Kelley Drye & Warren LLP	A	N	Agree with proposed changes.	No response required.
8.	Thomas E. Pringle Vice President California Court Reporters Association	AM	N	<p>Modify the fourth line in subsection (a) to read, “The deponent, the court reporter and the person administering the oath must be present in person at the deposition. . . .”</p> <p>Also, add the following sentence to the end of rule 333(a), “The reporter need not be personally present with the deponent if the reporter is able to adequately see and hear the deponent from his or her physical location.”</p>	<p>The committee did not think that this particular change was necessary or desirable.</p> <p>The committee did not agree with this particular suggestion. However, in response, it modified the second sentence of (d) to read: “The deponent must be sworn in the presence of the deposition officer or by any other means stipulated to by all parties or ordered by the court.”</p>
9.	Hon. Harry R. Sheppard Superior Court of Alameda County	A	N	Agree with proposed changes.	No response required.

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10.	Prof. Robert L. Simmons University of San Diego	A	N	Agree with proposed changes.	No response required.
11.	Arnella I. Sims President Los Angeles County Court Reporters Association	AM	N	<p>Expanding the use of telephone appearances and including videoconferencing or other remote electronic means for conducting discovery will expand the number of cases heard wherein court reporters cannot comply with existing California Rules of Court, rule 298(h), Code of Civil Procedure section 269 and/or Business and Professions Code section 8017. The present telephone technology used in courts throughout California for purposes of appearance of counsel is inadequate and often results in court reporters being unable to report proceedings completely and accurately. Expanding the use of telephone and adding videoconference or other remote electronic means for conducting discovery without also adding both the technological and procedural aspects of using electronic technology in a far more effective manner than contained in proposed rule 333 will result in further deterioration of the ability of court reporters to make a verbatim record.</p> <p>LACCRA suggests further consideration of proposed rule 333 be deferred, and the subject matter contained within proposed rule 333 be referred to the Reporting of the Record Task Force that has recently been approved by the Judicial Council and appointments made by the Chief Justice.</p>	<p>While expanding the use of telephone and videoconferences to cover depositions may provide some technical challenges, the committee does not think that implementation of the statute should be delayed. The committee will consider any specific proposals that would improve the quality of transcripts that are submitted.</p> <p>The committee disagreed. To implement the statute and provide guidance to litigants and the public, rule 333 should be adopted promptly.</p>

Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

Comments for SPR02-09  
Rule on Conducting Discovery by Electronic Means:  
Oral Deposition by Telephone, Video Conference, or Other Remote Electronic Means

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
12.	Alan Slater, Chair Court Executives Advisory Committee	A	Y	Recommend to the Judicial Council's Civil and Small Claims Advisory Committee approval of new Rule of Court 333 as submitted. The CEAC also recommends that the Civil and Small Claims Advisory Committee should continue to monitor any upcoming legislative changes to the Code of Civil Procedure and weigh its impacts on the current rules and whether additional rule amendments are needed.	The committee notes CEAC's support and will continue to monitor legislation in this area.
13.	State Bar of California's Committee on Administration of Justice	AM	Y	<p>The State Bar of California's Committee on Administration of Justice ("CAJ") has reviewed, analyzed, and discussed proposed new rule 333 of the California Rules of Court, and appreciates the opportunity to submit these comments. For the reasons discussed below, the proposed new rule appears to be at odds with Code of Civil Procedure section 2025, subdivision (h)(3), and should be drafted to conform to that statute.</p> <p>1. Ability of non-party deponents to appear by telephone</p> <p>Section 2025 draws a distinction between non-party deponents and party deponents. Under subdivision (h)(3) of section 2025, a non-party deponent may appear at his or her deposition by telephone, if the court finds good cause and no prejudice to any party. A party deponent, in contrast, must appear at his or</p>	The rule has been modified to distinguish between non-party and party deponents and to include provisions based on Code of Civil Procedure section 2025(h)(3) on non-party deponents.

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				<p>her deposition in person and be in the presence of the deposition officer. Proposed rule 333(a) draws no such distinction. Under proposed rule 333(a), “[t]he deponent and the person administering the oath must be present in person at the deposition....” The rule does not appear to allow a non-party deponent to appear by telephone at his or her deposition, even if a court finds good cause and no prejudice to any party. To that extent, the proposed rule is inconsistent with, and more limiting than, subdivision (h)(3) of section 2025.</p> <p>2. Ability of non-noticing parties to attend in-person depositions by telephone</p> <p>Subdivision (h)(3) of section 2025 provides in part: “A person may take, and any person other than the deponent may attend, a deposition by telephone or other remote electronic means.” This appears to allow a non-noticing party to appear by telephone or other remote electronic means at any deposition, including a deposition that was noticed to take place in person only. Proposed rule 333(c), in contrast, provides in part: “Any party may appear and participate in a deposition taken by telephone, videoconference, or other remote electronic means in the same manner as if the party were physically present at the deposition.” (<i>Italics added.</i>) The proposed rule does not provide that any person may</p>	<p>The rule provides that non-noticing parties may attend depositions by telephone and other remote electronic means. (See rule 333(b).) The rule has been revised to eliminate the ambiguities and limitations identified by the commentator.</p>

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				attend a deposition by remote electronic means, even when the deposition is taken in person. It is not clear whether proposed rule 333 is intended to preclude that practice, and limit the ability of a non-noticing party to attend by remote electronic means to situations where the noticing party chooses to take the deposition by remote electronic means. To the extent there is any such limitation, the proposed rule appears to be inconsistent with, and more limiting than, subdivision (h)(3) of section 2025.	